

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

**JOHN HOLLIS NEYMAN, on behalf of)
himself and on behalf of others similarly)
situated,)**

Plaintiff,)

Case No. 4:15-cv-586

v.)

**CHEROKEE ELECTRIC)
COOPERATIVE,)**

Defendant.)

**DEFENDANT CHEROKEE ELECTRIC COOPERATIVE'S MOTION TO
DISMISS**

Defendant Cherokee Electric Cooperative, by and through counsel, hereby moves the Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) as a result of Plaintiff's failure to state a claim upon which relief can be granted.

Defendant purchases electric power at wholesale from the Tennessee Valley Authority ("TVA") for distribution at retail sale to its members, like Plaintiff. Pursuant to congressionally granted authority under the TVA Act of 1933 (the "TVA Act"), 16 U.S.C. § 831 *et seq.*, TVA has the authority to set both the wholesale rates charged to the distributor of the power and energy as well as the electricity sales rates at the consumer level. TVA also has the authority to include

in its wholesale power sale contracts such terms and conditions it deems necessary or desirable for carrying out the purposes of the TVA Act. Defendant's power contract with TVA includes provisions which expressly set retail sales rates Defendant is required to charge its members for electricity and terms and conditions which expressly limit how Defendant can use revenue derived from those sales. Despite these contractual limitations, which are imposed pursuant to TVA's congressionally granted authority, Plaintiff maintains that Alabama law requires Defendant to ignore the terms of its contract with TVA and to distribute certain revenues to all of its members in the form of retail rate reductions or through distribution of excess revenue as "Patronage Capital." As such, Plaintiff seeks to use Alabama law to modify and interfere with TVA's authority granted pursuant to the TVA Act. Because the relief requested by Plaintiff will necessarily be an obstacle to and frustrate the purposes of the TVA Act, Plaintiff's claims are preempted by federal law. Additionally, Plaintiff's claims must be dismissed because they are derivative claims and Plaintiff does not have standing to pursue them. Because Plaintiff's claims predicated on application of Alabama law are preempted, and because Plaintiff does not have standing to pursue derivative claims against Defendant, Plaintiff's claims fail as a matter of law and must be dismissed.

Accordingly, for the reasons stated in Defendant's Memorandum of Law in Support of its Motion to Dismiss, filed contemporaneously herewith, Defendant respectfully requests that the Court dismiss Plaintiff's claims with prejudice.

Respectfully submitted this 15th day of April, 2015

The Coggin Firm, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

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Dated this 15th day of April, 2015.

The Coggin Firm, LLC

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